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Supreme Court, U.S.
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No. 99-826

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

DAVID CHMIEL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the prosecution's use, for substantive and impeachment purposes, of the former testimony of a former deceased lawyer at an ineffectiveness hearing violate a criminal defendant's right to effective assistance of counsel for his defense under Article I §9 of the Pennsylvania Constitution and Pennsylvania statutory law, as well as under the Sixth Amendment, when it is used against him as he takes the stand in his own behalf at a new trial?

2. Does the prosecutor's use, for substantive and impeachment purposes, of the former testimony of a former deceased lawyer at an ineffectiveness hearing violate a criminal defendant's Fifth Amendment right to be free from compelled self-incrimination where Pennsylvania constitutional and statutory rights guaranteeing the attorney-client privilege and the right to effective assistance of counsel are implicated and where it is used against him as he takes the stand in his own behalf at a new trial?

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CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I §9 of the Pennsylvania Constitution provides in relevant part that "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel...." Pa. Const. Art. I §9. It has been codified at 42 Pa. C.S. §2501(b), as has the attorney-client privilege at 42 Pa. C.S. §5916.

2. The Sixth Amendment to the Constitution of the United States provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const., Amend. VI.

3. The Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person... shall be compelled in any criminal case to be a witness against himself..." U.S. Const., Amend. V.

4. The Fourteenth Amendment to the Constitution of the United States provides in relevant part that "[n]o State shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const., Amend. XIV, Section 1.

STATEMENT OF THE CASE

The petitioner seeks this Court's review of the Supreme Court of Pennsylvania's opinion in this capital case, vacating the judgment of sentence and remanding for a new trial. The crux of the lower court's opinion is that the trial court erred irreparably when it allowed client confidences, disclosed by David Chmiel's former trial attorney at an ineffectiveness hearing, to be imported into Chmiel's subsequent second criminal trial, at which time said attorney was deceased. Grounding its holding on "the policy inherent in the [state] legislative recognition and judicial enforcement of the attorney-client privilege, as it implicates a defendant's exercise of the right to the effective assistance of counsel and to freedom from compelled self-incrimination, [which] restricts the use as well as the scope of permitted disclosures," the lower court held that " client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges." Pet. App. 40a.

In its recitation of facts, the petitioner alludes to Chmiel's former deceased trial counsel's testimony at the pertinent ineffectiveness hearing, repeatedly emphasizing the concern he had regarding suborning perjury were Chmiel to have taken the stand at trial, given three alleged inconsistent statements Chmiel had made to him in the course of their attorney-client relationship. Pet. 4-6. Without allowing that any of the three versions could be true (indeed Chmiel testified to the alibi version at his second trial) and without considering that obtaining full disclosure from a client within the attorney-client relationship takes time and trust, the petitioner declaims "Attorney Kennedy obviously knew Chmiel was lying to him about where he was at the time of the crime, because he gave three distinct and contradictory versions of his whereabouts on a material issue." Pet. 6. Such a declamation flies in the face of the lower court's acknowledgment that "[i]n criminal cases, the difficulty of obtaining full disclosure from the accused is well known, and would certainly become an absolute impossibility if the defendant knew that the lawyer could be compelled to report what he had been told." McCormick on Evidence §87 (4th ed. 1992); Pet. App. 39a.

Aligning itself with the dissenting opinion issued in the 5-2 majority decision of the court below, the petitioner, in an attempt to bolster its theme that Chmiel committed perjury when he testified at his second trial and that preclusion of attorney-client disclosures for impeachment purposes would somehow create a license for defendants to commit perjury, cites the dissent's notion that the majority, by its decision, protects a criminal defendant's "right to seek a new trial in which he is free to commit perjury without consequences." Pet. 9. Indeed, a form of the word "perjury" appears eleven times in the course of the petitioner's 22-page petition in this case, not including other words and phrases that suggest deception. Insultingly, the petitioner goes so far as to accuse the lower court of placing "a premium on perjury to the detriment of the truth determining function that should be the overriding concern of the criminal justice system." [emphasis added] Pet. 10.

Ignored in the petitioner's recitation is the lower court's observation that the purpose of the attorney-client privilege "is not to further the fact-finding process, but to foster a confidence between attorney and client that will lead to a trusting and open dialogue." Pet. App. 37a-38a. Ignored as well is the lower court's recognition that "[t]he critical importance of the attorney-client privilege to the administration of the criminal justice system is indicated not only by its ancient lineage, but also by its codification in statute." Pet. 39a. "[T]he existence of a statutory privilege is an indication that the legislature acknowledges the significance of a particular interest and has chosen to protect that interest."

Commonwealth v. Wilson, 529 Pa. 268, 282, 602 A.2d 1290, 1298, cert. denied 504 U.S. 977, 112 S.Ct. 2952, 119 L.Ed.2d 574(1992); Pet. App. 39a.

Ultimately, the petitioner ignores that the codification of the attorney-client privilege in Pennsylvania, 42 Pa. C.S. §5916, which is integral to the decision of the Supreme Court of Pennsylvania, Pet. App. 40a, 44a, provides independent state grounds for the reversal of Chmiel's convictions and judgments of sentence and the remand of his case for a new trial. It appears as well that the majority decision of the lower court, in addressing the issue of effective assistance of counsel, may well have been relying on Article I, Section 9 of the Pennsylvania Constitution rather than the Sixth Amendment to the United States Constitution. While the dissenting opinion characterizes Chmiel's issue as a Sixth Amendment right to counsel issue, Pet. App. 43a-49a, the majority opinion makes no explicit reference to the Sixth Amendment other than in the context of the Confrontation Clause, Pet. App. 32a, in its discussion of Chmiel's "Asserted Denial of Constitutional Rights," Pet. App. 31a-42a.

REASONS FOR DENYING THE WRIT

The Supreme Court of Pennsylvania, rendering a comprehensive and well-reasoned decision in this case, has wisely safeguarded the attorney-client privilege in the context of a criminal defendant's exercise of the constitutional right to the effective assistance of counsel and the constitutional right to freedom from compelled self-incrimination. In doing so, the lower court has recognized that "once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." Patterson v. Illinois, 487 U.S. 285, 290 n.3, 108 S.Ct 2389, 2393 n.3, 101 L.Ed.2d 261 (1988). It has recognized as well that "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth" but "stands as a protection of quite different constitutional values - values reflecting the concern of our society for the right of each individual to be let alone." Tehan v. United States, 383 U.S. 406, 416, 86 S.Ct. 459, 465(1966). "[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" Id. at 415, 86 S.Ct at 464.

Contrary to the petitioner's assertion that the decision below involves "important questions of federal constitutional law that conflicts with analogous relevant decisions of this Court, decisions of other state courts of last resort and the United States Courts of Appeals," Pet. 10, the decision reflects that

independent state constitutional and statutory grounds have been relied on, and that little conflict, if any, exists between the lower court's decision and the decisions of other courts. The scenario in Chmiel's case is a rarity, such that the Supreme Court of Pennsylvania is indeed accurate in characterizing the issue at bar as "a question of first impression not only in [Pennsylvania], but, apparently, in almost all other jurisdictions as well." Pet. App. 20a. Under these circumstances, it cannot be said that the Supreme Court of Pennsylvania "has decided an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. Rule 10(c), 28 U.S.C.A.

I. The Prosecution's Use of His Former Lawyer's Testimony at Trial For Substantive or Impeachment Purposes Deprives A Criminal Defendant of His Right to the Effective Assistance of Counsel for His Defense Under Article I Section 9 of the Pennsylvania Constitution and Pennsylvania Statutory Law, As Well as the Sixth Amendment to the United States Constitution.

Contrary to the petitioner's contention that the Supreme Court of Pennsylvania found the attorney-client privilege to be "non-existent based upon a waiver of the privilege," Pet. 10-11, "the policy inherent in the legislative recognition and judicial enforcement of the attorney-client privilege" serves as the underpinning of the lower court's opinion. Pet. App. 40a. In fact, all the lower court said was that "the client's attack on the competence of counsel serves as a waiver of the privilege as to the matter at issue." [emphasis added] Pet. App. 17a. The "matter at issue" was, of course, "the competence of counsel." The waiver issue, it is to be noted, is distinct from the lower court's discussion of the use of the former testimony exception as codified under 42 Pa.C.S. §5917. Pet. App. 24a-29a.

While the court below remarks that certain of its prior decisions imply that "a right or privilege once waived is always waived and that the defendant who waives a right or privilege cannot therefore object to the use that is made of the formerly privileged communications," it qualifies that implication, noting that it applies "absent other considerations." Pet. App. 36a. In Chmiel's case, it is clear that the lower court recognizes the presence of "other considerations," namely the interplay of the attorney-client privilege with the constitutional rights of effective assistance of counsel and freedom from compelled self-incrimination.

The petitioner misrepresents, once again, the lower court's opinion when it frames the issue as though Chmiel's former lawyer's testimony was used for impeachment purposes only. In light of the trial court's "consciousness of guilt" jury instruction, Pet. App. 22a-23a, the court below explicitly stated that it viewed the use of Attorney Kennedy's former testimony as constituting substantive evidence, not merely impeachment evidence, contrary to the trial court's contention. Pet. App. 23a. Were such

testimony used for the putative purpose of impeachment alone, however, the lower court does state the following:

> Our decision requires that we vacate the judgment of sentence imposed upon David Chmiel and remand for a new trial. In doing so, we note that "there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used for impeachment purposes, and permitting them to be used for substantive purposes as well." [California v. Green, 399 U.S. 149, 164, 90 S.Ct. 1930, 1938(1970) (citing Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620(1968). Given the extremely prejudicial nature of a defendant's prior inconsistent statements as testified to by the defendant's former counsel, we conclude that to ask the jury to consider former counsel's testimony for purposes of impeachment but not as substantive evidence would be to ask the impossible. Accordingly, Attorney Kennedy's testimony shall not be utilized for any purposes at retrial.

Pet. App. 41a.

Straining at the bit, the petitioner, nonetheless, proposes that the Supreme Court of Pennsylvania, with its decision, "has fashioned an exclusionary rule." Pet. 10. "No unlawful police conduct is implicated in this case that would warrant the harsh penalty of the exclusionary rule," the petitioner opines. Pet. 11. In so stating, the petitioner entirely misses the point. Neither Chmiel nor the court below has ever maintained that there was police misconduct which would trigger the exclusionary rule in this case. The exclusionary rule, however, (the purpose of which is to deter unlawful police conduct, as the petitioner acknowledges - Pet. 11) is not the only factor that bears on the admissibility of evidence. Evidence may be deemed inadmissible because its prejudicial impact outweighs its probative value. A witness may invoke the Fifth Amendment and preclude his own testimony without there having been police misconduct. Generally, confidential communications would be inaccessible evidence in light of the attorney-client privilege. Various balancing tests are conducted in determining the admissibility of evidence that have no bearing whatsoever on police misconduct and the exclusionary rule.

In the instant case, the lower court specifically ruled that "client confidences properly disclosed by an attorney at an ineffectiveness hearing may not be imported into the client's subsequent trial on criminal charges." [emphasis added] Pet. App. 40a. Thus, the petitioner's analogy to police misconduct and the exclusionary rule is totally without merit, and nothing more than a red herring. The various cases that the petitioner cites in support of its misplaced thesis involve issues of potential police misconduct bearing on the Fourth, Fifth and Sixth Amendment right to protection from unreasonable searches and

seizures, freedom from self-incrimination, and the right to counsel. They are inapposite to the issue at bar. The court below was particularly concerned with "the extremely prejudicial nature of a defendant's prior inconsistent statements as testified to by the defendant's former counsel," Pet. App. 41a., not police misconduct.

Whereas in Michigan v. Harvey, 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, a case cited with favor by the petitioner, the Court concerned itself with a prophylactic rule that, specutively, might deter future violations from police-initiated interrogation, but did not warrant the preclusion of the use of statements for impeachment purposes, the instant case is one in which Justice Stevens' reasoning in the dissenting opinion should prevail. In that dissent, Justice Stevens noted that, with respect to the Sixth Amendment, it is the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim. Id. at 363, 110 S.Ct. at 1187. Here, where no police conduct is claimed, that is the crux. "The interests of the defendant in the assistance of counsel in his confrontation with the prosecutorial forces of organized society extend to all efforts to elicit information from the defendant whether for use as impeachment or rebuttal at trial or simply to formulate trial strategy. Id. at 36, 110 S.Ct. at 1186. "The justification for disallowing such evidence would not be the exclusionary rule, but the Sixth Amendment's rules governing a fair trial." Id. at 362 n.7, 110 S.Ct. at 1187 n.7.

While it is submitted that the foregoing arguments demonstrate that the use of Attorney Kennedy's former testimony deprived Chmiel of his Sixth Amendment right to effective assistance of counsel at trial, it is further contended that his right to effective assistance of counsel was denied under Article I, Section 9 of the Pennsylvania Constitution and Pennsylvania statutory law as codified at 42 Pa.C.S. §2501(b) and 42 Pa.C.S. §5916.

In pertinent part, Pennsylvania's applicable constitutional provision provides "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel...." Pa. Const. Art. I §9. It has been long held that in interpreting the Pennsylvania Constitution, the Supreme Court of Pennsylvania is not bound by the United States Supreme Court's interpretation of similar federal constitutional provisions. See Commonwealth v. Ludwig, 594 A.2d 281, 281-82(Pa. 1991). The state constitutional provision guaranteeing the right to effective assistance of counsel has furthermore been codified into statutory law at 42 Pa.C.S. §2501(b). The statue reads in pertinent part as follows:

> (b) Criminal matters – In all criminal prosecutions the accused has a right to be heard by himself and his counsel.

42 Pa.C.S. §2501(b).

Viewed in conjunction with Pennsylvania's statutory law on the attorney-client privilege, solid independent state grounds exist for the decision of the Supreme Court of Pennsylvania in this case. 42 Pa.C.S. §5916 reads as follows:

> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

Pa.C.S. §5916. As noted above, this statute serves as an underpinning of the lower court's holding. In fact, it was state statutory law on the attorney-client privilege which the lower court had in mind when it quoted from one of its earlier decisions, to wit: "[T]he existence of a statutory privilege is an indication that the legislature acknowledges the significance of a particular interest and has chosen to protect that interest." Commonwealth v Wilson, 529 Pa. 268, 282, 602 A.2d 1290, 1298, cert denied, 504 U.S. 977, 112 S.Ct. 2952 (1992) (wherein it was held that privilege created by state sexual assault counselors' privilege statute is absolute, applying to production of documents as well as to testimony, and where defendants were not denied their constitutional right to confrontation by application of the state statute); Pet. App. 39a.; See also Commonwealth v Sims, 513 Pa. 366, 373-4, 521 A.2d 391, 394 (1987); Commonwealth v Maguigan, 511 Pa. 112, 124-25, 511 A.2d 1327, 1333-34 (1986); Slater v Rimar, Inc., 462 Pa. 138, 148, 338 A.2d 584, 589 (1975); Pet. App. 16a, 37a-38a.

Thus, there is no need nor justification for this Court to review the case at hand. The issue here is not one bearing exclusively on federal constitutional law. As noted earlier, the majority decision makes no specific reference to the Sixth Amendment. Certiorari is not normally granted solely to review what purports to be an application of state law. Leavitt v Jane L., 518 U.S. 137, 144, 116 S.Ct. 2068, 2072 (1996). Notwithstanding, the decision dispenses of any lingering Sixth Amendment concerns by soundly reasoning that the exercise of the right to effective assistance of counsel, whether founded on the United States or Pennsylvania Constitutions, cannot be hamstrung or chilled by making a criminal defendant fearful of challenging counsel's effectiveness because his confidence might be revealed at a subsequent trial. Pet. App. 39a-40a.

II. The Use of His Former Lawyer's Testimony for Substantive or Impeachment Purposes Violates a Criminal Defendant's Fifth Amendment Right To Be Free From Compelled Self-Incrimination.

When the Supreme Court of Pennsylvania determined that Chmiel's "Fifth Amendment right to be

protected against self-incrimination" was violated by the use at trial of the compelled disclosure of the statements that he had made in confidence to Attorney Kennedy at the ineffectiveness hearing, its ruling was well within the scope of the Fifth Amendment. Indeed, "Kennedy [had become] Chmiel incriminating himself," Pet. App. 44a, and to think that jurors could have viewed it otherwise is gratuitous thinking on the petitioner's part.

Disingenuously, the petitioner cites Raffel v. United States, 271 U.S. 494, 497 (1926) for the proposition that a criminal defendant, by taking the witness stand, loses the privilege of the Fifth Amendment's protection completely. Pet. 18. This Court, in Raffel, however, qualified its pronouncement by noting that whether the privilege survives "must necessarily depend upon the reasons underlying the policy of the immunity, and one's view as to whether it should be extended." Id. at 498. It doesn't survive when proper questions are asked "unless there is some reason of policy in the law of evidence which requires their exclusion." Id. at 497. In Chmiel's case, it is submitted, the evidentiary rule of evidence that calls for the weighing of the probative value of evidence against its prejudicial impact in determining admissibility was at issue. The Supreme Court of Pennsylvania specifically noted the "extremely prejudicial" nature of Attorney Kennedy's former testimony. Pet. App. 41a. Raffel has been distinguished by subsequent decisions of this Court by virtue of the very same evidentiary balancing test. See United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133 (1975); Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963 (1957).

Unlike the case at bar, Raffel was a case that was decided within the confines of the Fifth Amendment alone (albeit, the Sixth Amendment and attorney-client privilege, apparently not raised, could have factored into the decision, which involved the trial court inquiring into, first, whether the defendant had taken the stand at his first trial and, second, why the defendant had not taken the stand at his first trial). Raffel, unlike the immediate case, involved a defendant's right to remain silent. Here, in Chmiel's case, there is an inextricable interplay between the Fifth Amendment right against self-incrimination and the attorney-client privilege as it impacts on the right to effective assistance of counsel under both the United States and Pennsylvania Constitutions. This interplay, it is submitted, constitutes the kind of qualification Raffel contemplates, even though the Court did not find any under the circumstances of that case.

Again, disingenuously, the petitioner cites Fisher v United States, 425 U.S. 391, 397 (1976) for the proposition that the Fifth Amendment "is limited to prohibiting the use of physical or moral compulsion

exerted on the person asserting the privilege." In doing so, the petitioner categorically dismisses Fifth Amendment protection for Chmiel and the fact that Attorney Kennedy served as Chmiel's agent, reasoning that it was Kennedy who was compelled to make confidential attorney-client disclosures and not Chmiel, even though the disclosures in question were alleged reiterations of what Chmiel had said within the attorney-client relationship. Fisher, however, (which involves whether the Fifth Amendment applies to the subpoenaed production of documents), citing 8 Wigmore §2307, p592, explicitly states as follows:

> It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law... or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. [emphasis added]

Fisher, 425 U.S. at 404.

Given the context of the immediate case, in which Kennedy's compelled disclosures at the ineffectiveness hearing were imported into Chmiel's subsequent trial, it is noteworthy that the Court, in Fisher, gave the following clarification on Fifth Amendment protection:

> The proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court that under appropriate safeguards private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they were uttered. [emphasis added]

Id. at 400. Thus, it appears that this Court has recognized the agency relationship between an attorney and his client and that compelled attorney-client confidential communications are, indeed, subject to the Fifth Amendment protection against self-incrimination.

Putting the proverbial "cart before the horse," the petitioner goes on to argue that "[n]o one compelled Chmiel to take the witness stand at his retrial," and yet he did so, knowing "that the trial court would permit the prosecution to impeach him with Kennedy's, not Chmiel's, testimony." Pet. 18. Such an argument ignores what Chmiel has contended all along and what the Pennsylvania Supreme Court has recognized – that Chmiel should never have been put in this position in the first place. The issue has less to do with the strength of the prosecution's case than it does with the prosecution impermissibly attempting to strengthen its case by coming through the back door with evidence it would not normally

have at its disposal, especially in view of the fact that Attorney Kennedy, had he been alive at the time of the retrial, would very likely have invoked the attorney-client privilege, as he had done at the ineffectiveness hearing prior to being compelled to testify by the trial court. Unlike at the ineffectiveness hearing, Kennedy's performance would not have been attacked at the trial unless he took the stand. Thus, any incentive or justification for his taking the stand would be absent.

Contrary to the petitioner's assertions, the Supreme Court of Pennsylvania insightfully recognized the "chilling effect on defendants' exercise of their right to effective assistance of counsel" such a choice as Chmiel was faced with would have were it allowed to continue. Pet. 39a-40a. In arriving at this insight, the lower court wisely recognized that the attorney-client privilege and the Fifth Amendment right against self-incrimination could not be severed from the matrix of state and federal constitutional and statutory guarantees that inform the criminal justice system. None of the federal cases cited by the petitioner "squarely" conflict with the lower court, contrary to the petitioner's claims otherwise.

III. Certiorari Should Be Denied As There Are No State and Federal Decisions That Truly Conflict With the Lower Court's Well-Reasoned Decision and As There are Sufficient Independent State Grounds to Justify the Lower Court's Decision.

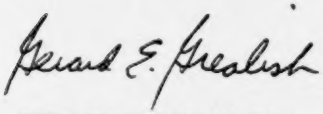
As the petitioner acknowledges, the various federal and state cases it cites have only "touched upon the questions presented here in a peripheral or more direct manner." [emphasis added] Pet. 20. As each case cited is distinguishable from the instant case, the respondent trusts in the Court's discretion to review their applicability. It is submitted that, among those cases, the most analogous to Chmiel's case is People v Dennis, 177 Cal.App. 3d 863, 223 Cal Rptr. 236 (Cal.App. 1986), the case cited with favor by the lower court. Pet. App. 20a, n.3. Clearly, Dennis is not in conflict with the court below.

The respondent refers the Court to his earlier argument, in which he contends there are sufficient independent state grounds to justify the decision of the Supreme Court of Pennsylvania.

CONCLUSION

For the foregoing reasons, David Chmiel respectfully requests that the Court deny the petition.

Respectfully submitted:



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Dated: December 15, 1999

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